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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JOHN DAVID PAMPLIN,

*Petitioner,*

vs.

J. BENEDETTI, *et al.*,

*Respondents.*

3:08-cv-00007-RCJ-VPC

ORDER

This represented habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' motion (#27) to dismiss. Petitioner John David Pamplin seeks to set aside his 2002 Nevada state conviction, pursuant to a guilty plea, of one count of murder and two counts of child abuse resulting in substantial bodily harm. Respondents contend that the petition is wholly unexhausted and further that the petition is time-barred. The Court reaches only the exhaustion issue.

***Governing Law***

Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement, the claim must have been fairly presented to the state courts completely through to the highest court available, in this case the state supreme court. *E.g.*, *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup> Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2003). In the state courts, the petitioner must refer to the specific federal

1 constitutional guarantee and must also state the facts that entitle the petitioner to relief on the  
 2 federal constitutional claim. *E.g.*, *Shumway v. Payne*, 223 F.3d 983, 987 (9<sup>th</sup> Cir. 2000). That  
 3 is, fair presentation requires that the petitioner present the state courts with both the operative  
 4 facts and the federal legal theory upon which the claim is based. *E.g.*, *Castillo v. McFadden*,  
 5 399 F.3d 993, 999 (9<sup>th</sup> Cir. 2005). The exhaustion requirement insures that the state courts,  
 6 as a matter of federal-state comity, will have the first opportunity to pass upon and correct  
 7 alleged violations of federal constitutional guarantees. *See, e.g.*, *Coleman v. Thompson*, 501  
 8 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

### 9 *Discussion*

10 Petitioner concedes that federal Grounds 2, 3 and 4 are not exhausted. The question  
 11 of whether the federal petition, as amended, is wholly unexhausted therefore comes down to  
 12 a question of whether federal Ground 1 is exhausted.

13 In federal Ground 1, petitioner alleges that he was denied due process in violation of  
 14 the Fifth and Fourteenth Amendments because the state district court failed to consider at  
 15 sentencing mitigating factors including his lack of prior history, the matter of whether he was  
 16 under an extreme mental or emotional disturbance at the time of the incident, and the matter  
 17 of whether he acted under duress.

18 In his state court motion to correct an illegal sentence, petitioner asserted in principal  
 19 relevant part as follows:

20  
 21 Clearly, the sentence imposed by the Court was illegal  
 22 because as stated by the Supreme Court in RAMOS V. STATE  
 23 83 P.2D 147 (1938) and again in RAINSBERGER V. STATE 399  
 24 P.2D 129 (1965) "In a prosecution for murder, where the  
 defendant pleads guilty, NRS 200.030 requires that trial court *first*  
*determine the degree of guilt and then fix punishment, upon the*  
*theory that no issue is left as to the guilt of a crime of murder.*"

25 This Court not only did not review the evidence *in an effort*  
 26 *to decide degree, but arbitrarily designated the first degree as is*  
*shown by the transcripts of the guilty plea hearing.* (see exhibit  
 B) This also was done in direct violation of NRS 175.201.

27 It was the duty of the Court to weigh and hear all evidence  
 28 in order to *designate the degree or desinate [sic] the lowest*  
*degree pursuant to* NRS 175.201.

1 The plaintiff has suffered extreme harm by *this* clear  
 2 violation of the Fifth Amendment right to Due Process and his  
 3 Fourteenth Amendment right to Equal Protection under the law.  
 4 The prejudice was furthered by violation of his Sixth Amendment  
 right to effective assistance [sic] of counsel which is obvious due  
 to the fact of there being no objection to the proceedings by  
 plaintiffs [sic] counsel.

5 Also, the plaintiff believes that had the evidence been  
 6 reviewed and weighed as proscribed by statute *the Court would*  
*have had to entertain the option of a lesser charge of Voluntary*  
 7 *Manslaughter* a violation of NRS 200.050.

8 The *other* point the plaintiff would raise in support of this  
 9 motion would be the fact [sic] that the Court failed to review and  
 apply [sic] mitigating circumstances as outlined in NRS  
200.035.

10 These clear and obvious violations of Nevada Statute *and*  
 11 *the United States Constitutional law* by the Court not only  
 warrants, but demands the Court to act pursuant to NRS 176.555  
 12 and correct this illegal sentence thereby affording the plaintiff the  
 constitutionality gaurenteed [sic] benefit of *equal protection and*  
 13 *equal application of the law*.

14 #22, Ex. 19, at page 2 (italic emphasis added).

15 The Court will assume, purely *arguendo*, that the Supreme Court of Nevada decided  
 16 *the claim actually asserted in the state court* on the merits when it affirmed the denial of the  
 17 state court motion to correct an illegal sentence.<sup>1</sup>

18 Even with this *arguendo* assumption, the claim in federal Ground 1 was not fairly  
 19 presented and exhausted by the claim asserted in the state court motion to correct an illegal

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20 <sup>1</sup>This purely *arguendo* assumption is subject to question. Under Nevada law, a motion to correct an  
 21 illegal sentence may challenge only the facial validity of the sentence. Thus, relief may be granted only where  
 22 the district court lacked jurisdiction to impose the sentence or the sentence exceeded the statutory maximum.  
 23 See #22, Ex. 29, at 2. The claims in petitioner's motion did not fall within these limited available grounds for  
 the motion. The mere fact that the Supreme Court of Nevada listed the claims asserted by petitioner in his  
 24 motion did not mean that the court considered such claims in affirming the denial of the motion. The state  
 high court did not discuss the merits of the claim based upon the alleged failure to review and apply mitigating  
 25 circumstances. The Ninth Circuit decision in *Chambers v. McDaniels*, 549 F.3d 1191 (9<sup>th</sup> Cir. 2008), arguably  
 is distinguishable in substance given that the Court of Appeals was addressing in that case a discretionary  
 26 procedure where the merits of the petition could be considered but would not typically be considered absent  
 extraordinary circumstances. See 549 F.3d at 1195-99. With a motion to correct an illegal sentence, in  
 27 contrast, the issues that could be considered were circumscribed under Nevada law, and petitioner's claims  
 did not fall within the ambit of claims that could be considered on such a motion. This Court need not  
 28 definitively resolve any such issue, however, given that the claim in federal Ground 1 was not fairly presented  
 to the state courts even if, *arguendo*, the claims actually asserted in the state court motion were adjudicated  
 on the merits by the Supreme Court of Nevada.

1 sentence. Petitioner did not fairly present a claim to the state courts that the state district  
2 court's alleged failure to review and apply any mitigating circumstances deprived him of due  
3 process of law. The only reference to due process protection under the Fifth Amendment in  
4 the state court motion is in connection with a claim that the state district court erred by failing  
5 to first determine the degree of guilt. In contrast, the one-paragraph argument as to the  
6 failure to review and apply mitigating circumstances refers – exclusively – to Nevada state  
7 law. The reference in the next paragraph to “these” violations of Nevada statutory law and  
8 federal constitutional law does not necessarily signify that petitioner was referring to  
9 constitutional violations on both claims. He had alleged constitutional error on one claim and  
10 only Nevada statutory law error on the other. In any event, it is established law that mere  
11 general appeals to broad principles – such as, as here, “United States Constitutional law” –  
12 do not exhaust any specific constitutional claim. *E.g.*, *Castillo*, 399 F.3d at 999. Rather, it is  
13 well-established law that fair presentation requires that the petitioner present the state courts  
14 with *both* the operative facts *and each federal legal theory* upon which his claim is based. *Id.*  
15 Petitioner did not present a federal due process claim in the state courts based upon the state  
16 district court's failure to review and apply mitigating circumstances.

17 Ground 1 therefore is not exhausted, and the entire petition accordingly is  
18 unexhausted.

19 Petitioner requests, if the Court holds that the petition is wholly unexhausted, that he  
20 be granted a stay pursuant to *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d  
21 440 (2005), to return to state court to exhaust the petition.

22 Petitioner urges, relying on *Rasberry v. Garcia*, 448 F.3d 1150 (9<sup>th</sup> Cir. 2006), that  
23 Ninth Circuit authority precludes a stay of an entirely unexhausted petition where “the record  
24 shows that there were exhausted claims that could have been included.” *Cf.* 448 F.3d at  
25 1154. He maintains that his case is distinguishable “because there are no other exhausted  
26 claims that could have been presented in the Amended Petition.” #32, at 6 n.2.

27 The distinction that petitioner seeks to draw is not one of substance but instead is one  
28 that ignores the rationale for the Ninth Circuit's decision in *Rasberry*.

1 The petitioner in *Rasberry* argued that the district court should have determined  
 2 whether he possibly had other exhausted claims before dismissing a prior wholly-unexhausted  
 3 petition without prejudice. The full quotation from which the petitioner in this case selectively  
 4 draws reads as follows:

5  
 6 District courts have the discretion to hold a mixed petition  
 7 in abeyance pending exhaustion of the unexhausted claims.  
 8 *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 1535, 161  
 9 L.Ed.2d 440 (2005). We decline to extend that rule to the  
 10 situation where the original habeas petition contained only  
 11 unexhausted claims, but the record shows that there were  
 12 exhausted claims that could have been included. Such an  
 13 extension would result in a heavy burden on the district court to  
 14 determine whether a petitioner who files a petition that on its face  
 is unexhausted may have other exhausted claims that could have  
 been raised. Once a district court determines that a habeas  
 petition contains only unexhausted claims, it need not inquire  
 further as to the petitioner's intentions. Instead, it may simply  
 dismiss the habeas petition for failure to exhaust. See *Jiminez v.*  
*Rice*, 276 F.3d 478, 481 (9th Cir.2001) ("Once [Appellee] moved  
 for dismissal, the district court was obliged to dismiss  
 immediately, as the petition contained no exhausted claims."  
 (quotation marks and citation omitted)).

15 448 F.3d at 1154.

16 The unavailability of a *Rhines* stay is not confined only to wholly unexhausted petitions  
 17 where there were exhausted claims that could have been raised. The *Rasberry* court  
 18 declined to *extend* the availability of a *Rhines* stay to such a situation, confirming the  
 19 otherwise applicable and well-established rule that a wholly unexhausted petition is subject  
 20 to immediate dismissal. The conceded fact that petitioner has no exhausted claims reinforces  
 21 – rather than detracts from -- the conclusion that a *Rhines* stay is unavailable here. The Court  
 22 thus is "obliged to dismiss immediately, as the petition contain[s] no exhausted claims."  
 23 *Jiminez*, 276 F.3d at 481.

24 IT THEREFORE IS ORDERED that respondents' motion (#27) to dismiss is GRANTED  
 25 and that this action shall be DISMISSED without prejudice.

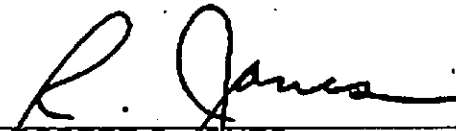
26 IT FURTHER IS ORDERED that a certificate of appealability is DENIED, as jurists of  
 27 reason would not find the district court's dismissal of the petition for lack of exhaustion to be  
 28 debatable or wrong. Petitioner invoked only Nevada state law on his claim that the state

1 district court erred in not reviewing and applying any mitigating circumstances in sentencing.  
2 Petitioner's strained argument that a *Rhines* stay is available on a wholly unexhausted petition  
3 in this context similarly does not present a reasonably debatable issue.

4 The Clerk of Court shall enter final judgment accordingly, in favor of respondents and  
5 against petitioner, dismissing this action without prejudice.

6 DATED: January 13, 2011

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ROBERT C. JONES  
United States District Judge